

THE HONORABLE JOHN H. CHUN

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

CASE NO.: 2:23-cv-01495-JHC

**JOINT STATEMENT
REGARDING PROPOSED
ECONOMICS DAY HEARING**

Pursuant to the June 6, 2024 Case Status Conference (“CSC”), Plaintiffs Federal Trade Commission (“FTC”) and the states and territories of New York, Connecticut, New Hampshire, Oklahoma, Oregon, Pennsylvania, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Puerto Rico, Rhode Island, Vermont, and Wisconsin, by and through their respective Attorneys General (together, “Plaintiff States,” and collectively with the FTC, “Plaintiffs”) and Defendant Amazon.com, Inc. (“Amazon”) submit this joint statement regarding a proposed economics day hearing (the “Hearing”), as discussed during the CSC.

I. PLAINTIFFS' PROPOSAL

The Court has proposed “a hearing where [the Court] would hear from both sides’ economists about the theories being advanced in this case,” with the goal of being “as educated as possible regarding the economic theories in this case.” June 6, 2024, Hr’g Tr. 4:14-24. Consistent with the Court’s request, and subject to any additional proposals or revisions by the Court, Plaintiffs propose that the following protocol govern the Hearing:

A. HEARING PROTOCOL AND PROCEDURES

- The Hearing shall be conducted in September 2024, or as soon thereafter as practicable, subject to the Court’s and the economists’ availability. Plaintiffs believe that an in-person hearing will be more efficient, but the parties’ economists will be available to present in person or remotely, whichever is more convenient for the Court.
- Both sides’ economist(s) will have equal time to present, with the Court having the opportunity to question the economists throughout the Hearing. Plaintiffs recommend allotting up to two hours for each side to present, with one hour reserved for any follow-on questions from the Court for either side, subject to the Court’s preferences and availability.
- No cross-examination or legal argument by either side’s lawyers will be permitted, and the parties’ economists will not be permitted to question each other.
- The Hearing will be for educational purposes only. With the exception of informing the relevant scope of fact discovery, nothing stated or presented at the Hearing (including written presentation materials) shall be cited, considered, or

used in this litigation, admitted into evidence, or used in connection with any fact or expert witness examination (including cross-examination and impeachment) at deposition or trial.

- The Parties shall work in good faith to avoid issues relating to the disclosure of confidential information, and to minimize or avoid the need for any redactions in the Hearing materials. The Hearing will be conducted in open court.

B. SCOPE OF THE ECONOMISTS' PRESENTATIONS

Both sides' economists will present on the economic principles and theories relevant to this matter, including, but not limited to, topics relating to monopoly power, the nature of competition in online markets, and the economic analysis of Amazon's challenged conduct and its impact on competition.¹ Because fact discovery remains ongoing, with expert opening reports not due until October 3, 2025, the economists do not yet have access to the data, documents, and testimony on which their analyses and opinions in this case will be based. Accordingly, the economists will present their economic theories based on the facts alleged in Plaintiffs' Amended Complaint, Dkt. #170, and any asserted procompetitive justifications disclosed in any written response to Plaintiffs' pending Interrogatory No. 1 that Amazon submits sufficiently in advance of the Hearing.² The parties will exchange any presentations or demonstratives they plan to use no later than two weeks before the Hearing to help identify "different economic

¹ Plaintiffs understand that the Court is seeking to hear from economists about the "economic theories in this case," June 6, 2024, Hr'g Tr. at 4:14-19, and thus disagree with Amazon's proposal to the extent it seeks to inject discussions regarding "legal theories and legal standards." *See, e.g.*, Amazon's Position below, at 5-6. Amazon's proposal for up to four hours of lawyer-led presentations on the "relevant legal framing" or other legal argument, divorced from any motion or pretrial briefing, misses the mark.

² Amazon has represented that it will provide its initial substantive response to Plaintiffs' interrogatory in July 2024.

theories being advanced” to highlight during their presentations. *See* June 6, 2024, Hr’g Tr. 11:10-13.³ Such presentations will not exceed 75 slides in length.

II. AMAZON’S PROPOSAL

Amazon welcomes the Court’s request for a discussion on economic issues to inform the Court’s management of the case. Amazon has given consideration as to how best to structure such a discussion to be most effective for the Court at this stage. Given the Plaintiffs’ wide-ranging complaint, which challenges multiple parts of Amazon’s business under what Amazon believes are novel legal theories, there are numerous economic theories related to the Complaint that could be debated. Depending on which claims continue in this case, the expert portion of this case may be significant, involving many days of testimony by many different experts, including several economists. The Parties are not scheduled to begin identifying experts and disclosing their opinions until October 2025.⁴ Given the early timing of this economics discussion,⁵ Amazon is concerned that absent an orderly process for ensuring a tailored

³ Amazon asserts that the parties “have not been able to advance discussions on the more complex issue related to which economic issues should form the basis of the discussion,” and proposes for the first time in this filing a process whereby the parties will submit disputes over “which economic issues should form the basis of the discussion” for resolution by the Court. *See* Amazon’s Position below, at 5. Until today’s filing, Plaintiffs understood that the parties were in agreement that the Court wanted each side’s economist to address “the case at large,” *i.e.*, the economic theories relevant to all aspects of the case. *See* June 6, 2024, Hr’g Tr. 11:1-14. While Plaintiffs welcome further guidance from the Court regarding the topics that are of most interest, Plaintiffs believe that it would be most efficient for the parties to exchange materials prior to the Hearing so that each side’s economists can be prepared to address any theories the other side intends to address, as contemplated by Plaintiffs’ proposal.

⁴ *See* Case Management Order of Feb. 13, 2024, at 2, Dkt. #159.

⁵ “Economics-day”-type sessions have often been scheduled in the context of a specific legal motion, such as a *Daubert* motion attacking the admissibility of a particular expert’s opinion at summary judgment or trial. *See, e.g., In re: Capacitors Antitrust Litig.*, No. 14-3264, 2021 WL 5407452, at * 1 (N.D. Cal. Nov. 18, 2021) (*Daubert*); *see also In re: Google Play Store*

1 discussion that focuses on core economic theories, and without appropriate legal context for
2 those economic theories, any early economics discussion may not be as beneficial as other
3 economics discussions have been for other courts.

4 Amazon and the FTC have met and conferred on the appropriate approach to an
5 economics discussion, as reflected in this submission, but have not been able to advance
6 discussions on the more complex issue related to which economic issues should form the basis of
7 the discussion. Amazon proposes for consideration that the Court ask the Parties to confer and to
8 submit by August 20 a list of economic issues that (i) all Parties agree should be addressed in the
9 discussion with the Court, and (ii) that either Plaintiffs or Amazon believe should be addressed
10 but for which there is not a consensus among all Parties.⁶ The Court could then provide
11 feedback to the Parties, and seek any additional clarification on the parties' proposed economic
12 issues for discussion, at the status conference scheduled for September 3. If helpful to the Court,
13 attendance at that conference could be in person.

14 Amazon proposes that the Court then schedule a session in the Fall at which counsel for
15 the Parties would each have a set amount of time (*e.g.*, up to two hours) to provide the legal
16 framing and context for the economic issues identified by the Court as most useful to address at
17 this stage. We understand that other similar economics discussions before other courts, in
18 addition to having the benefit of a factual record from which the experts can draw, also follow
19 significant prior legal briefing that has provided the Court with the legal framework for assessing
20

21 *Antitrust Litig.*, No. 20-CV-05761-JD, 2022 WL 17252587, at *3 (N.D. Cal. Nov. 28, 2022)
(class certification).

22 ⁶ Amazon would be concerned that the FTC's proposal to have the experts base their
23 presentations solely on the unproven allegations of the Complaint and an early interrogatory
24 response by Amazon would not provide the Court with the kind of substantive engagement on
the core economic issues that would be most useful in the litigation.

1 the relevance and admissibility of the experts' opinions.⁷ The economic issues and theories in
2 this matter are closely intertwined with the antitrust legal theories and legal standards,
3 themselves often complex, about which the parties may have strongly differing views and which
4 will inform how the parties present economic theories for the economic discussion. Amazon
5 proposes this relatively short initial session with counsel will thus be high-value and make any
6 subsequent economics discussion even more productive, by providing the Court with initial legal
7 framing that would help guide the Court in evaluating the myriad of economic issues that could
8 theoretically be relevant to the claims.

9 While the parties do not agree on the details of the format for this initial economics
10 discussion, the parties are in agreement that: (a) the parties will organize their presentations in a
11 manner that will not involve the disclosure of confidential information covered by the Protective
12 Order in this case; and (a) nothing presented may be used as evidence, cited in further written
13 submissions, or used to cross-examine witnesses in the course of subsequent proceedings or trial
14 in this case.

15 Amazon submits that, with the benefit of a process to tailor the appropriate economic
16 theories for which early discussion with the Court will be fruitful, as well as an initial session to
17 provide relevant legal framing, subsequent economics discussions later in the case will be useful
18 to the Court in addressing any claims that survive to that point.

19 * * * *

20 The Court's willingness to engage on economic issues at this stage is welcomed, and
21 Amazon looks forward to working to make the process as helpful as possible at this pre-
22 discovery stage.

23
24 ⁷ Cf. note 2 *supra*.

1 Dated: June 27, 2024

Respectfully submitted,

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